Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-684

PACIFIC MARITIME ASSOCIATION AND INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION and its Locals 13, 63, 10 and 34,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Brief of Respondent California Cartage Co., Inc. in Opposition to Petition for Certiorari.

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SUBJECT INDEX

	Page
Opinions Below	1
Question Presented	2
Statute Involved	2
Statement of the Case	4
1. Introduction	4
2. Historical Background	5
3. Early Development of Unitized Loads	6
4. Container Freight	6
5. Container Freight Stations	7
6. History of Container Freight Station Operations in Los Angeles	7
7. History of ILWU Collective Bargaining Agreements	8
A. Traditional Coverage	8
B. Mechanization and Modernization Agreement	9
8. Unfair Labor Practices	10
A. Negotiation of Container Freight Station Supplement of January 5, 1970	10
B. June 30, 1971 Work Stoppage	11
C. Execution of Memorandum of Understanding, February 10, 1972	12
Argument	13
1. The Decision Below Does Not Conflict With National Woodwork Manufacturers Association v. NLRB, 366 U.S. 612 (1967)	13

Page

A. In Its Attempt to Show a Conflict Between National Woodwork and the Decision Below, Petitioners Misconstrue the Findings of the Board 13

2. The Decision Below Does Not Conflict With the Decisions of Other Courts of Appeals 14

A. The Work in Question Is Not the Traditional Work of the Longshore Unit .. 14

B. The Work in Question Is Neither Fairly Claimable or Work Recapture 15

3. Petitioners' Supplemental Brief Raises No Issue That Supports a Conflict in Decisions but Shows That Each Case Turns on Individual Facts 17

Conclusion 17

INDEX TO APPENDICES

Appendix A. Judgment .....App. p. 1

Order 3

Order 4

Appendix B. Decision 5

Decision and Order 41

TABLE OF AUTHORITIES CITED

Cases Page

American Boiler Manufacturers Association v. NLRB, 404 F.2d 547 (CA8 1968), cert. den, 398 U.S. 960 (1970) 14

Canada Dry Corporation v. NLRB, 421 F.2d 907 (1970) 16

Humphrey v. International Longshoremen's Association, ... F.Supp. ...., 90 LRRM 2838 (E.D. Va. 1975) 17

International Longshoremen's Association, Local 1248, AFL-CIO (U.S. Naval Supply Center), 195 NLRB 273 (1972) 15

International Longshoremen's Association, AFL-CIO (Consolidated Express Inc., et al.), 221 NLRB No. 144 (1975) 15, 17

NLRB v. National Maritime Union (Commerce Tankers Corp.), 486 F.2d 907 (C.A.2 1973) 16

National Maritime Union v. Commerce Tankers Corporation, 457 F.2d 1127 (C.A.2 1972) 16

National Woodwork Manufacturers Association v. NLRB, 366 U.S. 612 (1967) 13, 14, 17, 18

Sheetmetal Workers Local 223 v. NLRB, 498 F.2d 687 (CADC 1974) 16

Teamsters Local 282 (D. Fortunato, Inc.), 197 NLRB No. 124 (1972) 16

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 18

Statutes	Page
National Labor Relations Act, as amended	
Section 8(b)(4), 29 USC 158(b)(4)	11
Section 8(b)(4)(i), 29 USC 158(b)(4)(i)	2, 3, 4
Section 8(b)(4)(ii)(B), 29 USC 158(b)(4)(ii)(B)	2, 3, 4
Section 8(b)(4)(B), 29 USC 158(b)(4)(B)	16
Section 8(e), 29 USC 158(e)	2, 3, 4, 16
Section 10(e), 29 USC 160(e)	18
Section 10(f), 29 USC 160(f)	18

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Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Brief of Respondent California Cartage Co., Inc. in Opposition to Petition for Certiorari.

Petitioners argue that the decision herein conflicts with a decision of this Court and Courts of Appeal. It is clear, however, that no such conflict exists. The Court of Appeals properly held that the National Labor Relations Board findings were supported by substantial evidence on the record as a whole. Accordingly, a grant of Certiorari would not be warranted.

OPINIONS BELOW.

The Court of Appeals enforced the Decision and Order of the National Labor Relations Board as supported by substantial evidence on the record as a

whole, 515 F.2d 1018. Petitions for Rehearing and Suggestion for Rehearing *en banc* filed by both Petitioners herein were denied on August 11, 1975. Said Decisions are attached hereto as Appendix "A". The Board's Decision affirming the rulings, findings and conclusions of the Administrative Law Judge is reported at 208 NLRB No. 130. The Board's Decision and Order and the Decision and Order of the Administrative Law Judge are attached hereto as Appendix "B".

QUESTION PRESENTED.

Whether the Decision of the National Labor Relations Board as enforced by the Court of Appeals for the District of Columbia is in conflict with Decisions of this Court and other Courts of Appeals by finding that agreements and conduct the object of which is to satisfy union objectives outside the bargaining unit violate Sections 8(e), 29 USC 158(e) and 8(b)(4)(i) and (ii)(B), 29 USC 158(b)(4)(i) and (ii)(B) of the National Labor Relations Act as Amended (Act).

STATUTE INVOLVED.

This case involves the provisions of Section 8(e) and Sections 8(b)(4)(i) and (ii)(B) of the Act, which provide in relevant part as follows:

8(e):

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied,

whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void. . . .

8(b)(4)(i) and (ii)(B):

It shall be an unfair labor practice for a labor organization or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person . . .

Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . .

STATEMENT OF THE CASE.

1. Introduction.

In October of 1972 an Administrative Law Judge (ALJ) issued a Decision and Recommended Order that Petitioner Pacific Maritime Association (PMA) and Petitioner International Longshoremen's and Warehousemen's Union (ILWU) and certain of its Locals violated Section 8(e) of the Act, as amended, by entering into, maintaining and enforcing the provisions of the Container Freight Station Supplement, and, further, that the ILWU and certain of its Locals had violated Sections 8(b)(4)(i) and (ii)(B) of the Act, as amended, by inducing, encouraging and restraining PMA and its member companies with an object of forcing and requiring them to cease doing business with California Cartage Co., Inc. and others. Exceptions to that decision were filed and the NLRB heard oral argument on September 13, 1973. On February 11, 1974 the full Board, in a unanimous decision, affirmed the rulings, findings and conclusions of the ALJ and adopted his Recommended Order with certain modifications.

Separate Petitions for Review were filed with the Court of Appeals for the District of Columbia Circuit by the PMA and the ILWU and certain of its Locals. Cross-Applications for Enforcement were filed by the National Labor Relations Board. On June 26, 1975 the Court of Appeals found that the Opinion, Findings and Order of the Board were supported by substantial evidence on the record as a whole and that the Petitions for Review must be denied and the Order of the Board enforced. Thereafter, Petitioners PMA, ILWU and certain of its Locals filed timely Petitions for

Rehearing and a Suggestion for Rehearing *en banc*. On August 11, 1975 the Court of Appeals denied the Petition for Rehearing, and, having transmitted the Suggestions for Rehearing *en banc* to the full Court and no Judge having requested a vote thereon, denied Petitioners' Suggestion for Rehearing *en banc*.

2. Historical Background.

Respondent California Cartage Co., Inc. (Cal Cartage) is engaged in the handling, storage and transportation of interstate freight and the operation of a container freight station, as well as public and private warehouses and storage yards. [TR 100, 113-14, 117.[1]] Beginning in the 1940's Cal Cartage and other motor carriers have collected, consolidated and transported cargo to the first place of rest on a marine dock as to outbound loads and after the last place of rest on a marine dock with respect to inbound loads. [TR 50, 517, 520-22.]

Until 1960 it was the practice of Longshoremen on outbound shipments to take the cargo from the "skin of the dock" and replace it on pallets for loading aboard ship. Inbound shipments were handled in reverse manner. (ALJD 12; TR 1211-13.] In 1960 the PMA and ILWU entered into a mechanization and modernization agreement which eliminated make-work and feather-bedding practices such as the repalletization of cargo. Thereafter, palletized cargo delivered by motor

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[1]References are abbreviated as follows: NLRB Decision and Order: Bd. Dec.; Administrative Law Judge's Decision and Recommended Order: ALJD; Transcript of Testimony Before the Administrative Law Judge: TR; General Counsel's Exhibits: "GCX" except Exhibits A through U to GCX 2 (all party stipulation) will be referred to as [Stip. Ex. ....].

carrier employees represented by the Teamsters Union was loaded directly aboard ship without rehandling. [Bd. Dec. 4, ALJD 10; TR 12, 1213, 1214; Stip. Ex. G (14) pp. 2-3.]

3. Early Development of Unitized Loads.

In the 1950's and '60's Cal Cartage stuffed and unstuffed a substantial number of wooden containers and boxes for various steamship companies pursuant to a tariff under which Cal Cartage was compensated directly by the steamship line. At all times the stuffing and unstuffing and hauling were performed by employees of Cal Cartage who were members of the Teamsters Union. The procedures followed were generally the same. On outbound container loads Cal Cartage employees picked up the cartage at various locations in Los Angeles and stuffed the cargo into the boxes or containers at the off-dock Cal Cartage trucking facility and delivered the cargo to the dock. On inbound loads the procedure was generally reversed. [ALJD 8; TR 52, 55, 71, 77.] The work of stuffing and unstuffing freight consisted of both less than container loads and straight loads.[2]

4. Container Freight.

The modern container made it possible to handle all cargo as an integrated unit from shipper to motor carrier to steamships. These containers are constructed

[2]Less than load cargo (LCL or LTL) is cargo carried by container or truck which has more than one export mark and which originates from more than one shipper and is destined for more than one consignee. Straight loads, on the other hand, are defined as one type of cargo in containers and boxes on a single bill of lading for a single shipper. [Bd. Dec. 3; ALJD 11; TR 56, 164-65, 856, 886.]

of steel or aluminum and are equivalent to the dimensions of a truck-trailer body. The result is an integrated transportation system designed to carry freight without rehandling by vessel, truck, air or rail. [TR 157, 449-50, 462, 982-83.]

5. Container Freight Stations.

Steamship companies have traditionally contracted with motor carriers such as Cal Cartage to stuff and unstuff shippers' and consignees' freight to and from containers. [TR 60-61, 465-66, 740, 745, 980-81.] These containers have required motor carriers such as Cal Cartage to establish container freight station facilities with rail sidings and truck docks to stuff and unstuff containers and to warehouse and distribute the freight. [TR 3, 119-20.]

6. History of Container Freight Station Operations in Los Angeles.

The first container ship on the Pacific Coast was placed in service in 1959. It was serviced by the only container freight station at that time which was the Pacific Motor Trucking (PMT) facility which used Teamster-represented employees to stuff and unstuff containers. [ALJD 12; TR 188, 438, 566-67.] This was followed in 1962 by Sealand which opened a waterfront container freight station and yard. This container station was staffed by employees of Sealand who were represented by the Teamsters Union. [TR 186-87, 214-15, 522-23, 1334.]

Cal Cartage has operated a container freight station since about 1966. This container freight station is approximately two and one-half miles from the nearest

dock and services a number of shipping lines as well as non-shipping companies and freight forwarders on the East Coast and in Europe. [ALJD 8; TR 100, 113-14, 116-17, 126-27, 406-08, 130.]

Throughout the late 1960's a number of other motor carrier companies using employees who were represented by the Teamsters Union established container freight station operations. [TR 180, 187-93, 197, 214-16, 232-33, 235-38, 240-45, 247-54, 1227.]

There were two other container freight stations which were operated by members of Petitioner PMA. While Petitioners in their Brief at pages 14 and 15 assert that a substantial amount of stuffing and unstuffing was being done by Longshoremen, these PMA member container stations were in fact staffed by employees who were not part of the Longshore workforce.[3] Even as late as January 1971 the only other container freight station operated by a PMA member was exclusively staffed by non-Longshore terminal warehousemen. [ALJD 13; TR 208-11, 214, 265, 314-15, 961-64, 1009-10, 1066-67, 1194-96, 1345-48.]

7. History of ILWU Collective Bargaining Agreements.

A. Traditional Coverage.

Longshore contracts have traditionally applied only to movement of cargo on marine docks. Longshore work has been defined in successive contracts since 1937 as including the handling of cargo in its transfer

[3]These employees were known as terminal warehousemen or TW's. While they were members of ILWU Local 13, they worked under separate collective bargaining contracts in a totally separate bargaining unit. Even after the Petitioners executed the Container Freight Station Supplement, these PMA members continued to use terminal warehousemen at their container freight stations.

from vessel to first place of rest and vice versa, including sorting and piling of cargo on the dock, and the direct transfer of cargo from vessel to railroad car or barge and vice versa, when such is performed by employees of the companies party to the agreement. [Section 1 of Stip. Ex. G 3-11.]

B. Mechanization and Modernization Agreement.

In the memorandum of August 10, 1959 and October 18, 1960 the ILWU agreed to divest itself of make-work-featherbedding practices. It also agreed not to protest reduction of work due to mechanization and modernization such as introduction of new methods of cargo handling designed to increase productivity and speed up handling of cargo. (Bd. Dec. 45; ALJD 10.) This led to the use of the modern container and revolutionary new stevedore equipment. The agreements contemplated a loss of jobs for Longshoremen due to the mechanization. In exchange for these agreements the PMA established a fund of $29,000,000 and later an additional $34,000,000 for pension augmentation, vested retirement benefits and unemployment due to introduction of new cargo handling methods. [ALJD 10; TR 1155-57; Stip. Ex. G 14, Section B.] In addition, the parties agreed that for the first time in twenty-three years the contractual definition of longshore work would include certain dock work between the first and last places of rest on the dock, but whether to perform this work under the agreement was expressly left to the option of PMA members. [Stip. Ex. G, 14 ¶¶ 11, 12, pp. 2-3.]

Successive Pacific Coast Longshore and Clerks Agreements since 1961 have continued to provide that the

only work covered thereunder is work with respect to the movement of cargo which is under the control of PMA members and at a dock. [Section 1.11 of Stip. Exs. A, B, T-15 and I-10; GCX 3, Appendix A, p. 1.] Disclaimers with respect to Longshore rehandling of palletized, unitized or package loads were contained in the Mechanization and Modernization Agreement and successive Pacific Coast Longshore Agreements since 1961. [Sections 1.22, 1.23 of Stip. Exs. A, G; Stip. Ex. G 14, ¶ 16, p. 3.]

8. Unfair Labor Practices.

A. Negotiation of Container Freight Station Supplement of January 5, 1970.

Notwithstanding the nearly universal practice of stuffing and unstuffing modern containers at container freight stations operated by motor carriers during the 1960's, ILWU and PMA in January 1970 entered into the Container Freight Station Supplement. This agreement provided *inter alia* that all container freight station work other than shippers' loads and door-to-door deliveries was to be brought to the dock or areas adjacent to the dock and to be performed by ILWU personnel on or before June 30, 1970. That Agreement further provided that the transition period within which the work was to be brought to the dock would extend until the expiration dates of existing contracts for the work plus the additional necessary time to build, lease or provide for a new facility or expansion of present facilities if such was required. [Bd. Dec. 6; ALJD 11; Stip. Ex. C, §§ 1.5, 1.51.]

B. June 30, 1971 Work Stoppage.

On June 14 and 24, 1971 Respondents ILWU and Local 13 advised its members that at 12:01, June 30, 1971 containers not stuffed by Longshoremen (other than shippers, military and door-to-door loads) would not be loaded aboard ship. [ALJD 18-19, GCX 2, ¶¶ 7, 9.][4] Petitioners argue in their Brief at pages 18 and 19 that the 8(b)(4) violation found against the ILWU and its Locals consisted solely of efforts directed towards PMA members. To the contrary, the President and the Vice President of Local 63 instructed Longshoremen and Clerks not to load any non-ILWU container unless it was a shipper's load. During a conversation with these Union officers, the Vice President of Cal Cartage was informed by telephone that under the Container Freight Station Supplement no Cal Cartage containers were to be received at the Los Angeles container terminal. Thereafter, a Los Angeles container terminal representative informed the Cal Cartage representative that if he attempted to order his employees to receive a Cal Cartage container the entire complement of Longshore employees would walk off the job. [ALJD 19, 20; TR 355-60, 391-92, 400-03, 140-41, 409-18.]

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[4]While Petitioners repeatedly contend that the Container Freight Station Supplement applies only to less than full container loads, as the Board found, a substantial number of the containers stuffed and unstuffed by Cal Cartage are in fact straight loads and not LCL loads, yet the Longshoremen attempted to apply their contract to those loads as well. [TR 355-60, 391-92, 400-03, 140-41, 409-18.]

C. Execution of Memorandum of Understanding, February 10, 1972.

Petitioners entered into a Memorandum of Understanding which in part amended the Container Freight Station Supplement and provided in part that PMA members shall cease their past practice of contracting the stuffing and unstuffing of containers in various zones defined in the Agreement to employers who are not signatory to the Agreement. The Memorandum also provides that even where containers are carried by a non-PMA member steamship vessel such containers are to be stuffed by ILWU employees covered by the collective bargaining agreement. [ALJD 11, 15, 19; GCX 3, ¶ 3.]

ARGUMENT.

1. The Decision Below Does Not Conflict With National Woodwork Manufacturers Association v. NLRB, 366 U.S. 612 (1967).

A. In Its Attempt to Show a Conflict Between National Woodwork and the Decision Below, Petitioners Misconstrue the Findings of the Board.

The Board did not state, as Petitioners argue, that the contract affected third parties and was therefore unlawful. Rather, the Board found that the very object of Petitioners was the labor policies of Cal Cartage and other motor carriers. Petitioners correctly state that *National Woodwork* held that a union might legitimately protect traditional work assignments irrespective of the impact on a third party. However, this Court cautioned that it was not permissible for a union to use the boycott in a manner tactically calculated to satisfy union objectives elsewhere. The Board correctly stated that *National Woodwork* is essentially a rule of law which requires a complex factual analysis. This Court made clear that the determination of the legality of restrictive clauses such as those in the instant case was not simple and must be made with full concern of all the surrounding circumstances as to whether the union's objective was preservation of work or to satisfy union objectives elsewhere.

The Board found that the work in question was traditionally performed by Cal Cartage and other motor carriers and that the union's object was to force and require PMA members to cease doing business with those companies. In fact, the Board clearly followed the instruction in *Woodwork* and made a factual inquiry into the economic personality of the industry and

the history of labor relations between the union and the employers who would be boycotted. Furthermore, the Board held, based on substantial evidence, that the work of stuffing and unstuffing was not in fact the traditional work of the Longshore workforce. Contrary to Petitioners' assertion, the Decision below did not fail to consider whether the work covered was a technological substitute for traditional unit work, but indeed found quite to the contrary that the traditional work of the Longshore unit was the loading and unloading of ships which they continue to perform. The dockside work of repalletization effectively bargained away in 1960 was mere make-work to begin with, hardly sufficient to support a claim of traditional work in Petitioners' attempt to acquire the work performed by Cal Cartage.

2. The Decision Below Does Not Conflict With the Decisions of Other Courts of Appeals.

A. The Work in Question Is Not the Traditional Work of the Longshore Unit.

Petitioners attempt in vain to show a conflict in several Courts of Appeals Decisions, including the Court of Appeals of the District of Columbia. Petitioners, as in their treatment of the holding of this Court in *National Woodwork*, ignore the factual finding that the object of the ILWU was to seek work traditionally performed outside the Longshore work unit. *American Boiler Manufacturers Association v. NLRB*, 404 F.2d 547 (CA8 1968), cert. den, 398 U.S. 960 (1970) relied on by Petitioners' is not in conflict with the instant case. There the Court pointed out that "traditional work" included work performed and still per-

formed by unit employees at a time a work preservation clause was negotiated. Or, as the Board recently stated in *International Longshoremen's Association, AFL-CIO (Consolidated Express Inc., et al.)*, 221 NLRB No. 144 (1975), "*National Woodwork, supra* and *American Boiler Manufacturers Association v. NLRB* cases are distinguishable from the instant case since, in those cases, the very work claimed had once been performed, exclusively, by employees in the units represented by the respondent organizations therein." In the instant case the ILWU sought work which traditionally had been performed by employees in other work units. *Cf., International Longshoremen's Association, Local 1248, AFL-CIO (U.S. Naval Supply Center)*, 195 NLRB 273 (1972).

B. The Work in Question Is Neither Fairly Claimable or Work Recapture.

It is clear that a finding of non-traditional work necessarily precludes a finding that the work is fairly claimable or work recapture. Moreover, the facts are clear that no such claim could be made in the instant case. The only container freight station work that had been performed by members of the ILWU was in fact performed by non-unit Terminal Warehousemen. Those Terminal Warehousemen who had been represented by ILWU Local 13 were represented under separate collective bargaining agreements and were engaged in public warehousing work, which clearly included the stuffing and unstuffing of containers at container freight stations. [TR 963-64, 1345, 1347.] In fact, even after the negotiation of the Container Freight Station Supplement, Terminal Warehousemen

continued to do container freight station work. [TR 196-97, 208, 211, 214, 265, 314, 317, 957-58, 961-64, 1009-11, 1016-17, 1066-67, 1194-96 and 1226.] The Container Freight Station Supplement does not permit Terminal Warehousemen working at stuffing and unstuffing at a CFS to become Longshoremen. (Stip. Ex. C, Sections 1.24, 7.21.]

At best, the Petitioner ILWU has sought to acquire work for union members generally. This is clearly impermissible, *Sheetmetal Workers Local 223 v. NLRB*, 498 F.2d 687 (CADC 1974) and *National Maritime Union v. Commerce Tankers Corporation*, 457 F.2d 1127 (C.A.2 1972). In *NLRB v. National Maritime Union* (*Commerce Tankers Corp.*), 486 F.2d 907 (C.A. 2 1973), the Court rejected a union's work protection argument noting "The beneficiaries of the union clause will not be those members now employed on the vessels, but the union as a whole." The same rationale was recently followed in *Teamsters Local 282 (D. Fortunato, Inc.)*, 197 NLRB No. 124 (1972), in which the Board stated "Agreements and conduct intended to protect, preserve, acquire or reclaim work for union members generally (*i.e.*, outside the immediate bargaining unit) violate both Sections 8(e) and 8(b)(4)(B) of the Act on the theory that they exceed the legitimate interests of the unit employees *vis-a-vis* their own employer and are therefore tactically calculated to satisfy union objectives elsewhere."[5]

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[5]Petitioners' "fairly claimable" argument in reliance on cases such as *Canada Dry Corporation v. NLRB*, 421 F.2d 907 (1970) is particularly inapposite, for, unlike the instant case, the court found the record "devoid of any evidence of a secondary objective."

3. Petitioners' Supplemental Brief Raises No Issue That Supports a Conflict in Decisions but Shows That Each Case Turns on Individual Facts.

Petitioners' attempt to show an inconsistency between the present case and the Decision of Judge Merhige in *Humphrey v. International Longshoremen's Association*, ... F.Supp. ....., 90 LRRM 2838 (E.D. Va. 1975) shows only an application of the doctrine set forth in *National Woodwork*. The Court in *Humphrey* stated that in that case "The contract provisions at issue were intended and operate solely to preserve historical work practices and that the eight year period during which the work in issue was not protected by contract does not serve to extinguish I.L.A.'s right to preserve by contract the right to strip full shipper loads within fifty miles of port in 1974." The Court goes on to make clear that the above finding was essentially a factual determination.[6]

CONCLUSION.

The essence of the instant case is a factual finding that Petitioners sought work tasks which were traditionally performed by employees of a different bargaining unit. Under such circumstances, the National Labor

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[6]Petitioners' concern about different legal standards between the East and West Coast is unfounded. If such a difference existed it would simply reflect different facts between two separate sets of unions and employees; moreover, it is noted that the Board has recently overturned the conclusions of ALJ Ordman relied on by Petitioners in *International Longshoremen's Association, AFL-CIO* (*Consolidated Express, et al.*), 221 NLRB No. 144 (1975).

Relations Act, as amended, provides in Section 10(e), 29 USC § 160(e) "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." Furthermore, Section 10(f), 29 USC § 160(f) provides that the parties may petition to a Court of Appeal and "Upon the filing of such petition the Court shall proceed in the same manner as in the case of an application by the Board under Subsection (e) of this Section. . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive." Furthermore, as this Court stated in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), "Our power to review the correctness of application of the present standard ought seldom be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." There is no such misapprehension in this case. Clearly, there was substantial evidence to support a finding of an unlawful secondary objective. Indeed, the only parties that have misapplied *National Woodwork* and holdings of various Courts of Appeal have been the Petitioners. Here the facts show that Petitioners have placed pressure on members of the Pacific Maritime Association in

order to effect their objectives *vis-a-vis* California Cartage, PMT and other motor carriers whose employees are employed under a collective bargaining contract with the Teamsters Union.

Therefore, under such circumstances a grant of certiorari is not warranted.

Respectfully submitted,

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APPENDIX

APPENDIX A.

Judgment.

United States Court of Appeals, for the District of Columbia Circuit.

September Term, 1974.

Pacific Maritime Association, Petitioner v. National Labor Relations Board, Respondent, California Cartage Company, Inc., Pacific Motor Trucking Company, Intervenors. No. 74-1266.

International Longshoremen's and Warehousemen's Union; Local 13, et al., Petitioners v. National Labor Relations Board, Respondent, Pacific Motor Trucking Company California Cartage Company, Inc., Intervenors. No. 74-1296.

Filed: June 26, 1975.

Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board.

Before: ROBB and WILKEY, Circuit Judges and MERHIGE,* United States District Judge for the Eastern District of Virginia.

These causes came on to be heard on petitions for review and cross applications for enforcement of an order of the National Labor Relations Board and were argued by counsel. While the issues presented occasion no need for an opinion, they have been

*Sitting by designation pursuant to 28 U.S.C. § 292(d).

accorded full consideration by the Court. See Local Rule 13(c). On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that for the reasons stated in the decision and order of the National Labor Relations Board, 208 N.L.R.B. No. 130 (Feb. 11, 1974) the court is of the opinion that the findings and order of the Board are supported by substantial evidence on the record as a whole and that the petitions for review must be denied and the order of the Board enforced.

Per Curiam
For the Court
/s/ Hugh E. Kline
Hugh E. Kline
Clerk

Order.

United States Court of Appeals, for the District of Columbia Circuit.

September Term, 1974.

Pacific Maritime Association, Petitioner v. National Labor Relations Board, Respondent. California Cartage Co., Inc. Pacific Motor Trucking Co., Intervenors. No. 74-1266.

International Longshoremen's and Warehousemen's Union; Local 13, et al., Petitioners v. National Labor Relations Board, Respondent. Pacific Motor Trucking Co., California Cartage Co., Inc. Intervenors. No. 74-1296.

Filed: Aug. 11, 1975.

Before: Robb and Wilkey, Circuit Judges; and Merhige*, United States District Judge for the Eastern District of Virginia

On consideration of the petition for rehearing filed by Petitioner Pacific Maritime Association and the petition for rehearing filed by Petitioner International Longshoremen's and Warehousemen's Union; Local 13, et al., it is

ORDERED by the Court that the aforesaid petitions are denied.

Per Curiam
For the Court:
HUGH E. KLINE, Clerk
By: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

Judge Merhige did not participate in the foregoing order.

*Sitting by designation pursuant to 28 U.S.C. §292(d).

Order.

United States Court of Appeals, for the District of Columbia Circuit.

September Term, 1974.

Pacific Maritime Association, Petitioner v. National Labor Relations Board, Respondent. California Cartage Co., Inc. Pacific Motor Trucking Co., Intervenors. No. 74-1266.

International Longshoremen's and Warehousemen's Union; Local 13, et al., Petitioners v. National Labor Relations Board, Respondent. Pacific Motor Trucking Co., California Cartage Co., Inc., Intervenors. No. 74-1296.

Filed: Aug. 11, 1975.

The suggestions for rehearing *en banc* of Petitioner Pacific Maritime Association and Petitioner International Longshoremen's and Warehousemen's Union; Local 13, et al. having been transmitted to the full Court and no Judge having requested a vote thereon, it is

ORDERED by the Court *en banc* that Petitioners' aforesaid suggestions for rehearing *en banc* are denied.

For the Court:
Hugh E. Kline, Clerk
By: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

APPENDIX B.

Decision.

United States of America, Before the National Labor Relations Board, Division of Judges, Branch Office, San Francisco, California.

International Longshoremen's and Warehousemen's Union, Local 13, International Longshoremen's and Warehousemen's Union; and Local 63, International Longshoremen's and Warehousemen's Union (California Cartage Company, Inc.) and Robert A. Curry International Longshoremen's and Warehousemen's Union; Local 13, International Longshoremen's and Warehousemen's Union; and Local 63, International Longshoremen's and Warehousemen's Union Respondent Unions and Pacific Maritime Association Respondent Employer and California Cartage Company, Inc. Pacific Motor Trucking Company Charging Parties. Case No. 21-CC-1326, Case No. 21-CE-103, Case No. 21-CE-112, Case No. 21-CE-109, Case No. 21-CE-111.

International Longshoremen's and Warehousemen's Union; Local 10, International Longshoremen's and Warehousemen's Union; and Local 34, International Longshoremen's and Warehousemen's Union Respondent Unions and Pacific Maritime Association Respondent Employer and International Cargo Services, Inc.; Richmond Export Services, Inc. Charging Parties. Case No. 21-CE-116, (Formerly Case No. 20-CE-88).

James S. Scott, Esq., and *John W. Prager, Esq.*, of Los Angeles, Calif., Counsel for the General Counsel.

Thomas P. Burke, Esq., and *David E. Rosenbaum, Esq.*, of *Rutan & Tucker*, Los Angeles, Calif., for the Charging Party, California Cartage Company, Inc.[1]

William E. Still, Esq., and *Robert S. Bogason, Esq.*, of Southern Pacific Transportation Company, San Francisco, Calif., appearing on behalf of Charging Party, Pacific Motor Trucking Co.

R. Bruce Hoffe, Esq,. of *Watson, Hoffe & Sannin*, Richmond, Calif., appearing on behalf of Charging Parties, International Cargo Services, Inc., and Richmond Export Services, Inc.

George A. Pappy, Esq., of *Brundage, Neyhart, Miller, Ross & Reich*, appearing as an interested party on behalf of the Union representing the employees of the Charging Parties.

Norman Leonard, Esq., and *Richard Patsey, Esq.*, of *Gladstein, Leonard, Patsey and Andersen*, San Francisco, Calif., appearing on behalf of Respondent Unions.

Kenneth E. Ristau, Jr., Esq., and *Kenneth W. Anderson, Esq.*, of *Gibson, Dunn & Crutcher*, Los Angeles, Calif., appearing on behalf of Respondent Employer.

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[1]All parties herein were advised by formal document dated September 28, 1972, that:

Charging Party CALIFORNIA CARTAGE COMPANY, INC., hereby substitutes MITCHELL, SILBERBERG & KNUPP, HARRY J. KEATON, THOMAS P. BURKE, and DAVID E. ROSENBAUM, 606 South Olive Street, Suite 1922, Los Angeles, California 90014, as its attorneys of record in the place and stead of Rutan & Tucker, Harry J. Keaton, Thomas P. Burke, and David E. Rosenbaum.

DECISION

Statement of the Case

JAMES T. RASBURY, Administrative Law Judge: These consolidated matters, proceedings under Section 10(b) of the National Labor Relations Act, as amended, herein called the Act, were tried before me at Los Angeles, California, on various dates between January 4 and June 7, 1972, with all parties participating pursuant to due notice upon consolidated complaint issued by the General Counsel.[2]

The complaint in 21-CC-1326 alleges that during the month of June, 1971, Respondent International, Respondent Local 13 and Respondent Local 63, herein Respondent Unions, engaged in, and induced and encouraged individuals employed by various persons, and threatened, coerced and restrained various persons engaged in commerce where an object thereof was to force or require persons engaged in commerce to cease handling or otherwise dealing in shipping containers

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[2]The original charge in Case No. 21-CC-1326 was filed June 30, 1971 and in Case No. 21-CE-103 on November 1, 1971, amended December 1, 1971. A consolidated amended complaint for these two cases only was issued December 9, 1971. Complaint issued in Case No. 21-CE-109 on December 29, 1971, based on a charge filed on December 7, 1971. At the opening of the hearing on January 4, 1972 a motion to consolidate the latter case (21-CE-109) with the former cases was granted. The hearing on the resulting consolidated matters was completed on January 19, 1972 and the hearing closed. Before time fixed for filing briefs expired and pursuant to motions duly filed, said record and matters were ordered reopened for the purposes of consolidation and receiving evidence in cases numbered 21-CE-111 (based upon charges filed February 24, 1972), 21-CE-112 (based upon charges filed February 24, 1972, and amended March 2, 1972) and 21-CE-116 (based upon a charge filed April 6 and amended April 19, 1972). The additional matters were heard on June 6 and 7, 1972 and the record closed.

stuffed or to be unstuffed by employees of California Cartage Company, Inc., herein called Cal Cartage, thereby violating Section 8(b)(4)(i) and (ii)(B) of the Act.[3]

The complaints in Cases No. 21-CE-103 and 21-CE-109 allege that Respondent Pacific Maritime Association, herein PMA, and Respondent Unions have engaged in, and are engaging in, unfair labor practices affecting commerce within the meaning of Section 8(e) of the Act,[4] in that said Respondents entered into,

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[3]Section 8(b) It shall be an unfair labor practice for a labor organization or its agents * * * (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: * * * (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the labor representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

[4]The pertinent and relevant portions of Section 8(e) of the Act read as follows:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract, or agreement, expressed or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer or to cease doing business with any other person, and any contract entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void.

invoked, and gave effect to a contract or agreement (the 1970-1971 container freight station supplement), whereby Respondent PMA, on behalf of its member-companies, agreed to cease or refrain from handling certain shipping containers stuffed or to be stuffed by employees of Cal Cartage or Pacific Motor Trucking Company, herein called PMT, or from otherwise doing business with Cal Cartage or PMT.

The complaints in Cases No. 21-CE-111, 21-CE-112 and 21-CE-116 alleged that Respondents[5] on or about February 10, 1972, entered into, and since then have maintained, in force and effect, a contract or agreement (the 1972 container freight station supplement), whereby Respondent PMA, on behalf of its member-companies, has agreed to cease doing business with Container Freight Station companies not employing workers covered by the ILWU-PMA contract, including, among others, Cal Cartage, PMT, International Cargo Services, Inc., herein called International Cargo, and Richmond Export Services, Inc., herein called Richmond Export.

The duly filed answers admit certain allegations of the complaint but deny that their course of conduct has in any way violated the Act.

All parties were ably represented and were afforded an opportunity to adduce evidence, to examine and cross-examine witnesses, and to file briefs. Excellent briefs, that have been most helpful, were received from

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[5]Locals 10 and 34 of International Longshoremen's and Warehousemen's Union, as well as the International Union and PMA are named as Respondents in 21-CE-116. Locals 13 and 63 of International Longshoremen's and Warehousemen's Union, the International Union and PMA are Respondents in the other four CE cases dealt with herein.

the General Counsel, Cal Cartage, PMT and each of the Respondents and they have been carefully considered.

Upon the entire record in the cases I make the following:[6]

Findings of Fact

I. Jurisdiction

Respondent PMA, a California corporation with its principal office and place of business at San Francisco, California, and a branch office at Wilmington, California, is an association of companies who are engaged in business in the States of California, Oregon and Washington as steamship companies, or stevedoring companies or in the operation of marine terminals, or in combination thereof. Respondent was organized for the purpose of, *inter alia,* and engages in negotiating and entering into collective-bargaining agreements on behalf of its members with the collective-bargaining representative of their employees, including Respondent Unions. In the course and conduct of their business operations described above the members of Respondent

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[6]At the hearing counsel for the interested parties (the various Teamsters Locals whose counsel was permitted to participate) moved to have the record in a current 10(k) proceeding admitted in evidence as a part of the record in this case. The motion was denied. On July 28, 1972, after the 10(k) hearing had been closed, the motion was renewed in writing. The motion is again denied. See *Brady-Hamilton Stevedore Company,* 198 NLRB No. 18, wherein Judge George O'Brien refused to accept a 10(k) record as evidence and was sustained by the Board.

A motion to correct the transcript was filed by Respondent PMA on March 30, 1972 and served on all parties. No objections having been received the motion is granted and the corrections to the transcript attached hereto as Appendix A.

PMA annually derive gross revenue in excess of $50,000 from the transportation of goods and passengers between the State of California and other states or foreign countries.

The complaints allege, the answers admit, and I herewith find that Respondent PMA is now, and has been at all material times herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Sections 2(2), (6) and (7), 8(b) and 8(e) of the Act. I also find the Charging Parties and each of them respectively is an employer within the meaning of Sections 2(2), (6) and (7), 8(b) and 8(e) of the Act.

II. The Labor Unions Involved

Respondent Unions do not deny and I herewith find that, at all times material herein, each of the Respondent Unions has been a labor organization within the meaning of Sections 2(5), 8(b) and 8(e) of the Act. I further find in accord with a stipulation by the parties hereto that during the month of June 1971, John Pandora occupied the position of president of Respondent Local 13, and is now, and has been at all times material herein an agent of Respondent Local 13, acting on its behalf, within the meaning of Section 2(13) of the Act. I further find in accord with the stipulation submitted by the parties hereto that during the month of June 1971, Joe Argentio occupied the position of vice president of Respondent Local 63, and is now, and has been at all times material herein, an agent of Respondent Local 63, acting on its behalf, within the meaning of Section 2(13) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Issue*

While violations of proscribed conduct under both Sections 8(b) (4) and 8(e) are alleged, a determination of the purpose, or object, of the disputed contract language negotiated and agreed to by the party Respondents will provide a basis for answers to all matters litigated.[7]

Respondents contend that the language in the supplemental contract giving rise to this dispute is nothing more than work preservation language sanctioned by the Board and the Supreme Court in *National Woodwork,*[8] and thus the Respondent Union's conduct in implementing the contract is not proscribed by the Act.

The General Counsel and the Charging Parties contend that the disputed language restricting the contracting out of container freight station operations has been designed to acquire new work and is thus proscribed by 8(e).

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[7]The 1966-1971 ILWU-PMA contract as applied to longshoremen's work is part of the stipulation and appears in the record as General Counsel's Exhibit 2a; a contract between the same parties for the same period as applied to marine clerks is part of the stipulation and is in the record as General Counsel's Exhibit 2b; (these two contracts are called Pacific Coast Longshore and Clerks Agreement, or the PCLCA). The container freight station supplement negotiated by and between the Respondent PMA and the Respondent Unions became effective January 5, 1970 and is part of the stipulation appearing in the record as General Counsel's Exhibit 2c. The various changes to the three aforementioned agreements that were negotiated and became effective February 10, 1972 to run through June 30, 1973, appear in the record as Appendix A to the all party stipulation entered in evidence as General Counsel's Exhibit 3.

[8]*National Woodwork Manufacturers v. N. L. R. B.*, (1967), 386 U.S. 612.

B. *Background*

1. The parties

RESPONDENT PMA is an association of companies engaged in business in the States of California, Oregon and Washington as shipping lines, or terminal operators, or as stevedores, or as combinations thereof. Since 1934 Respondent PMA and Respondent International have bargained collectively on a Pacific coastwide basis concerning the longshore employees of the member companies of Respondent PMA. Since 1947 the parties have bargained on the same basis with regard to marine clerks. Since 1961 bargaining has been conducted in a single coastwide unit covering the longshoremen and marine clerks. The Board certified the Waterfront Employers Association of the Pacific Coast as the bargaining agent for a coastwide unit of longshoremen as an appropriate unit in 1938.[9] The association was reorganized and acquired its present name in 1949. PMA negotiates contracts with the ILWU and administers them on a daily basis. PMA and the ILWU jointly operate dispatch halls in each port area. From the dispatch halls longshore labor is dispatched on a daily or job basis to various locations on the waterfront. Longshoremen are paid by checks issued by PMA and PMA in turn is reimbursed by the stevedoring or terminal company to whom the employee is dispatched. PMA maintains a central records office, an accident prevention department, a training department, and in the administration of the Union contracts processes grievances and handles arbitration matters. There are 121 member companies shown on the PMA roster.

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[9]*Shipowners Association of the Pacific Coast,* (1938), 7 NLRB 1002.

The principal governing body is the Coast Board of Directors. Voting is provided by the by-laws and is based on a rather complex tonnage formula. However, of the total voting strength, the shipowners represent approximately 80 percent.

CAL CARTAGE, which is engaged in California in the transportation of freight by motor truck and related work, has, for a number of years been engaged in the stuffing and unstuffing of shipping containers for various Japanese shipping lines engaged in the transportation of containerized cargo by ship to and from the ports of Los Angeles and Long Beach, California. Cal Cartage has approximately 365 employees of which approximately 70 to 75 are engaged primarily in stuffing and unstuffing containers. Cal Cartage was first hired by the Luckenbach Shipping Line to stuff and unstuff a collapsible type container in 1953.

In late 1955 or early 1956, Cal Cartage performed services for Coastwise Lines, a steamship company operating between Los Angeles and Alaska. This work consisted of loading and unloading equipment utilized for unitizing freight. Cal Cartage has also done work for Matson Navigation Company, Sea Land, American President Lines and Pacific Far East Lines. Cal Cartage has performed stuffing operations for other vessel operators, such as States Lines, as well as for various nonvessel operators including freight forwarders. Since the fall of 1968, Cal Cartage has been party to agreements with three of the four members of what has been called the Japanese consortium—Mitsui Osk Lines, Ltd., herein Mitsui, Kawasaki Kissen Kaisha, Ltd., herein K-Line, and Yamashita-Shinnihon Steamship Company, Ltd., herein Y-S Lines. These shipping lines

ship containers through Los Angeles Container Terminal, herein LACT, located at Berth 131, San Pedro, California. Pursuant to these agreements Cal Cartage, for the account of each of the shipping lines, has stuffed and unstuffed containers at its container freight station located at 2401 East Pacific Coast Highway, Wilmington California, which is located approximately three miles from LACT. The cargo stuffed by Cal Cartage consists of LCL cargo (less than container load) involving several bills of lading which completely fill one or more containers. Cal Cartage has also done stuffing work for the Nippon Yusen Kaisha Steamship Lines, herein NYK Lines and Showa Steamship Line, which ship containers through the Port of Los Angeles on ships operated by NYK Lines. The terminal and stevedoring work on these ships is performed by Matson Terminals, Inc., at Berth 208, Terminal Island, California. The contract between Cal Cartage and the Japanese shipping lines is nonexclusive and terminable on written notice. The containers and chassis (the devices on which the containers are handled over the road) used by Cal Cartage are owned by the respective shipping lines. The employees of Cal Cartage are represented by the Teamsters.

PMT, which is engaged in the trucking business in several western states has, since about 1960, been engaged in the operation of container freight stations for shipping line customers which ship containers through Matson Terminals facilities in the Port of Los Angeles. It has 25 employees regularly hired to perform stuffing and unstuffing in Los Angeles and on occasions has hired as many as 35 additional casuals on a daily basis to supplement its regular

work force in the stuffing and unstuffing of containers. PMT first performed some of Matson Navigation's container freight services under a letter agreement dated August 19, 1958. The letter agreement of August 19, 1958 was supplemented by a contract between PMT and Matson Navigation dated June 16, 1960. The agreement of 1960 was supplemented by agreements dated November 1, 1961, August 23, 1962, and October 2, 1967. Commencing in June 1962 the services performed by PMT for Matson Navigation and the rates for those services were covered by tariffs filed by PMT with the Interstate Commerce Commission. Since 1967 PMT has performed container freight station services for the NYK and Showa Shipping Lines in addition to the services performed for Matson Navigation. Contracts with these companies are terminable on 30 days' notice and are nonexclusive. The PMT employees are represented by the Teamsters.

INTERNATIONAL CARGO and RICHMOND EXPORT are two companies engaged in container stuffing and unstuffing at facilities located in Richmond, California. These two companies (along with a third—Richmond Transfer and Storage Co.) have a common ownership, the same officers, and are subject to common direction and policy. These companies are engaged in export packing and preservation, public warehousing and local cartage, manufacturing of shipping crates, performance of Bay Area operations for interstate freight forwarders, intrastate moving of household goods and personal effects and the stuffing and unstuffing of containers. The Richmond facilities have been licensed as off-dock container freight stations and the companies began their container freight station operation in 1963. Their employees are represented by the Teamsters.

The LOS ANGELES CONTAINER TERMINAL, herein LACT, is a California corporation which was formed by Mitsui, K-Line, Y-S Lines, Japan Lines and their United States agents, exclusively to perform terminal and stevedoring services for some of the container operations of these lines. LACT began operations in November of 1968 and performs no stuffing or unstuffing of containers, but is confined to the loading and discharging of containers from vessels operated by the four Japanese lines that formed the corporation. LACT is a member of PMA and employs 50 members of the ILWU-PMA unit, some of whom work as steadies and the remainder are referred, or dispatched daily, as casuals.

2. The Disputed Contract

The Respondent Unions have continuously represented the longshoremen and the clerks on the Pacific Coast for many years and at least since 1961 both types of workers have been covered under the ILWU-PMA Pacific Coast Longshore and Clerks' Agreement or Document. (PCLCA or PCLCD).

According to the testimony of John MacEvoy, who is the area manager for the Southern California area of PMA, in 1960 the parties reached agreement on what is described as the Modernization and Mechanization Agreement, or M & M Agreement. The heart of the agreement was that the Union agreed to divest itself of make work, featherbedding practices that had plagued the industry for many years and the member companies obtained the right to introduce new methods

and equipment which would increase productivity and reduce turnaround time of vessels in port by improving and speeding up the methods of handling cargo. The agreement provided that the longshoremen were to have jurisdiction over the operation of any new equipment. The agreement was to run for 5 years and PMA agreed to contribute a total of 29 million dollars to the Mechanization Fund during the five-year period. The fund was intended to be used in three ways; as a pension augmentation; a vested benefit to be paid on retirement for a man who had been registered in the industry at the start of the fund; and as an unemployment fund which was to offset any unemployment impact on the West Coast due to the introduction of revolutionary new methods of cargo handling. At the expiration of the first five-year period it was extended for an additional five-year period (until June 30, 1971) and PMA agreed to contribute an additional 34½ million dollars to the Mechanization Fund over the new five-year period.

During the life of the latter agreement, Respondents in January, 1970, entered into an agreement known as the Container Freight Station Supplement which provided, *inter alia,* that all container freight station work, other than shippers' loads and door-to-door deliveries, was to be brought to the dock or areas adjacent to the dock and to be performed by longshore personnel.[10] A transition period was provided to cover

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[10]A shipper's load or door-to-door load is a container that has been stuffed or packed by the manufacturer or owner consignor, generally at a point a considerable distance from the harbor or port, and which is to be loaded directly aboard the ship and moved directly to the purchaser or owner consignee. This type of container load was not brought into this dispute. We are herein primarily concerned with the less than full container load (frequently referred to as an LCL or LTL) which is a container whose contents have more than one consignee and generally more than one owner consignor and by necessity must be packed, or stuffed (or if inbound unpacked or unstuffed) at a point very near the point or wharf where the ship will be moored or berthed.

the expiration date of existing contractual arrangements that PMA member companies might have with non-bargaining unit members "plus the additional necessary time to build, lease, or provide for a new facility or expansion of present facilities if such is required."[11]

On or about February 10, 1972, the Respondents entered into a memorandum of understanding, which memorandum was ratified by the parties, providing for a number of changes to the 1970-71 Container Freight Station Supplement.[12] The changes were to become the new Pacific Coast Longshore and Clerks' Agreement and the new agreement was to run through June 30, 1973. It is the new language that provided the basis for the alleged violations as set forth in cases herein numbered 111, 112 and 116. (See footnote No. 1, *supra*). On May 24, 1972, the Respondents entered into an agreement which in effect nullified the February 10, 1972, negotiated changes in the Container Freight Station Supplement and substituted therefor the provisions of the earlier Container Freight Station Supplement.[13]

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[11]See Appendix B attached hereto, reflecting the most pertinent and relevant language taken from the 1970 Container Freight Station Supplement. The entire contract supplement is General Counsel's Exhibit 2C.

[12]The most pertinent changes are attached hereto as Appendix C. The entire memorandum of understanding is set forth in the record as Appendix A to General Counsel's Exhibit 3.

[13]This substitution of language was apparently a tactical maneuver by the Respondents. On May 16, 1972, United

(This footnote is continued on next page)

3. The Work History

The extensive testimony leaves no doubt that employees of the charging parties—PMT, Cal Cartage, International Cargo and Richmond Export—have, over the years, prepared cargo preliminary to loading aboard ship. This preparation included early forms of unitizing or banding together, or placing in some type of small box or container, all for the convenience of getting the material to the shipping line and, after reaching its final destination, to the consignee. The same is true for the employees and members of Respondents. From the late forties until 1960 the motor carrier personnel unloaded their unitized or palletized loads from the trucks and then removed the load from the pallet and placed the merchandise on the "skin of the dock." The longshoremen then placed the merchandise on their pallets and moved the pallets to ship side for loading aboard ship. In cases of inbound cargo the process was reversed. The Modernization and Mechanization Agreement cured this type of make-work practice. In 1961 an attempt was made by Respondent PMA to assign the work of loading and unloading trucks at the marine docks to longshoremen. Following a strike by the Teamsters the dispute was resolved, recognizing that such work was

States District Judge for the Central District of California, Jesse W. Curtis, granted a temporary injunction banning enforcement of the pertinent provisions of the 1972 Container Freight Station Supplement, Civil No. 72-892-JWC. On May May 24—as noted in the text above—the Respondents reverted to the old language. However, on June 15, 1972, the Court issued an order amending the May 16, 1972 order to specifically enjoin Respondents' enforcement of the provisions put into effect on May 24, 1972. *Johansen v. International Longshoremen's and Warehousemen's Union, et al.*, USDC CD Calif., Civil No. 72-892-JWC, June 15, 1972.

that of the Teamsters.[14] The evidence is clear that both longshoremen and teamsters (or non-longshoremen) have, over the past years, engaged in the "work" of preparing merchandise for loading aboard ship. The marine clerks and the longshoremen, at least on the basis of this record, have exclusively performed the "work" of loading and unloading the merchandise aboard the ship. The I.L.W.U. marine clerks render services for the terminal operator and these services might be described as the "paper work" or "book work" necessary to keep accurate records on just what is being shipped by whom. The I.L.W.U. longshoremen render services for the stevedoring company and are primarily engaged in the loading and unloading of the ship.

4. The Containerized Ship

The increase in size of the containers into which the cargo or merchandise is placed has been a gradual process. Keeping pace with this increase in container size has been the development of equipment capable of lifting or handling the larger containers. As these containers have grown larger it has revolutionized the shipping industry and resulted in fully containerized ships. The forerunner of such type ships was the *Hawaiian Citizen,* owned by Matson Navigation, and placed in service in 1959. The *Hawaiian Citizen* had been a conventional vessel, but was modified to carry a deck load of containers in addition to regular freight.

From that beginning the conversion to fully containerized ships has been rapid and the following was stipulated by the parties (General Counsel's Exhibit

[14]See P. 171 of General Counsel's Exhibit 2A.

No. 2, paragraph 19). Many PMA member steamship companies were, by December 1969 or prior thereto, and continuing to date, in the process of phasing out their use of conventional or "break bulk" cargo vessels and replacing them with fully containerized vessels. Some companies have eliminated a high proportion of their conventional type vessels while other companies continue to operate such vessels, either handling containers in the deck or in the square of the hatches of those vessels or using modified vessels that are container vessels in part and conventional vessels in part. Among the lines that have acquired vessels and other facilities for fully containerized operations are Matson Navigation Company (Matson Navigation), Sea Land, Sea Train, Japan Line (J-Line), Kawasaki Kissen Kaisha, Ltd. (K-Line), Mitsui Osk Lines, Ltd. (Mitsui), Yamashita-Shinnihon Steamship Company, Ltd. (Y-S Lines), Nippon Yusen Kaisha (NYK Lines), American President Lines, Pacific Far East Line, American Mail Line, Johnson Line, and States Line. Other PMA member steamship companies are in the process of converting to fully containerized operations.

This development led to the growth of Container Freight Stations. At the time the *Hawaiian Citizen* first docked in Los Angeles the only Container Freight Station in operation in the area was the PMT Container Freight Station at Wilmington, California, where non-longshoremen were employed to stuff and unstuff containers. PMT employees stuffed and unstuffed Matson's containers under a tariff (schedule of rates to be charged) issued by Matson covering container freight station work. The number of container freight stations has grown and various motor carrier employees perform stuffing and unstuffing services at these stations. In

the late 1960's Respondent Local 13 entered into agreements with three companies covering the work of stuffing and unstuffing containers, but these agreements were separate and distinct from the ILWU-PMA master agreement, or the PCLCA, and the employees were not a part of the longshore work force, but were called terminal warehousemen. It was not until after the execution of the Container Freight Station Supplement, that is the basis of this dispute, that employees coming within the purview of the PCLCA began rendering container freight station services. Under this factual situation, it can not be said that the stuffing and unstuffing of today's huge sophisticated containers is work historically or traditionally done by the Respondent Unions.

Respondents' Arguments

1. The growth of the small boxes or strapped pallets to today's 20 foot to 40 foot containers has been a gradual evolution and the work of stuffing and unstuffing these containers is traditional and historical work of longshoremen.

2. The disputed language is clearly addressed to the labor relations of the employer, PMA, viz-a-viz its own employees, the longshoremen and clerks.

3. The contracting Respondents have only sought to preserve or recapture that work which has traditionally and historically been performed within the bargaining unit.

4. The work of stuffing and unstuffing containers is "fairly claimable" and may properly be the subject of work preservation clauses quite apart from historical or traditional work considerations.

The Arguments of General Counsel and Charging Parties

1. The stuffing and unstuffing of modern day containers is not historically or traditionally work of longshoremen.

2. The Container Freight Station Supplement language seeks to reach out and acquire, or "capture", new work for employees in the ILWU-PMA bargaining unit.

3. The disputed clauses of the Container Freight Station Supplement are Union signatory clauses that would require non ILWU-PMA bargaining unit employers to join PMA and their employees to join the Respondent Unions.

Analysis[15]

As was indicated by the Supreme Court in *National Woodwork, supra,* a determination of whether the Container Freight Supplement (more specifically the clauses set forth in the attached Appendix B & C) and its enforcement violated Section 8(e) and Section 8(b)(4)(B) cannot be made without an inquiry into whether, under all the surrounding circumstances, the objective was preservation of work for longshoremen, or whether the agreement was tactically calculated to satisfy objectives elsewhere. If the latter is the case, the Charging Parties are neutral bystanders and the agreement and its enforcement become secondary.

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[15]While the language of *National Woodwork, supra,* seems clear and concise, the application is extremely difficult. In the instant case opposing counsel cited, analyzed and argued the same cases as support for opposing views. See also the September 18, 1972 Analysis section of LRRM, Vol. 81, No. 5.

There need not be an actual dispute with the secondary employer, here the Charging Parties, for the activity to fall within this category, so long as the tactical objective of the agreement and its maintenance is that employer. "The touchstone is whether the agreement is addressed to the labor relations of the contracting employer vis-a-vis his own employees."

In this case I can not conclude that the thrust of the Container Freight Station Supplement is directed toward the labor relations of the employer's present employees, but rather it appears to be directed toward the Union's concern to enlarge its membership and acquire work now being performed by non-longshoremen. I reach this conclusion based on an analysis of the work covered by the disputed contract language in light of the work customarily performed by the unit employees here seeking its protection, as well as the evidence of who is currently performing the work.

As indicated *supra* the traditional and historical role of the longshoremen is that of loading and unloading the cargo aboard ship. I can not equate the preparatory work of stuffing or unstuffing containers with loading or unloading cargo aboard ship. LACT was formed by four Japanese shipping lines and their United States Agents. LACT performs terminal and stevedoring services exclusively for the four Japanese shipping lines, all of which are members of PMA. But ever since operations of LACT commenced in November of 1968 Cal Cartage has performed the container freight station

work for three of the four Japanese lines at Cal Cartage's Wilmington facility. Thus, to paraphrase the Board in its recent *U. S. Naval Supply Center* case,[16] the employees (at the Cal Cartage Wilmington Container Freight Station) have never been part of the work unit covered by the Container Freight Station Supplement between Respondent PMA and Respondent Unions. Nor has the precise work which is the focus of the dispute herein ever been performed by employees working under that agreement. The sole function of the shipowners with respect to such work historically has been the receiving and transshipping of cargo to designated ports; that of the stevedoring companies, the loading and unloading (aboard the ship) of cargo delivered to them for that purpose. The ILWU's real dispute is thus with Cal Cartage. The Respondent Unions' real demands can only be met if Cal Cartage were to replace its own employees, now represented by Teamsters, with longshoremen. The fact that the Container Freight Station Supplement "upon which Respondents rely as being work preservation clauses, may in other circumstances have valid work preservation objectives, does not mean that they can be used as a shield for conduct aimed not at work preservation but at acquisition of work historically performed by employees in another work unit."[17]

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[16] *International Longshoremen's Association, AFL-CIO, et al. (U. S. Naval Supply Center)*, 195 NLRB No. 41, 79 LRRM 1289.

[17] *U.S. Naval Supply Center, supra,* citing *Intercontinental Container Transport Corp. v. New York Shipping Association,* 426 F. 2d 884 (C.A. 2).

What has been related with respect to Cal Cartage and their operation of a container freight station is equally true of the Charging Parties PMT, International Cargo and Richmond Export. PMT first performed some of Matson Navigation's container freight services under a letter agreement dated August 19, 1958, a copy of which appears as part of an all party stipulation (General Counsel Exhibit No. 2 S(1)). This letter agreement has been followed by subsequent agreements (General Counsel Exhibits No. 2 S(2)(3)(4) and (5)). Additionally PMT has rendered substantial container freight station services for NYK and Showa lines. International Cargo and Richmond Export have operated off-dock container freight stations since 1963 with non-longshore personnel. The language of the PMA-ILWU Container Freight Station Supplement seeks, under the guise of work preservation, to reach out and take the "work" which has been performed by non-longshoremen at container freight stations and place it in the hands of longshoremen. While the 1972 supplement is worded somewhat differently than the 1970 Container Freight Station Supplement, the tax or fine levied against PMA members for handling containers stuffed, or to be unstuffed by non-ILWU members is coercive and it seeks to preserve the same wrongful objective as was accomplished in the 1970 supplement. I find therefore that the Container Freight Station Supplement—particularly the language therefrom attached hereto as Appendix B (for the 1970 agreement) and Appendix C (for the 1972 agreement)—to be an agreement whereby the employer, Respondent PMA, has contracted with a labor organization, Respondent Unions, to cease doing business with another person, in this instance Cal Cartage, PMT, Inter-

national Cargo and Richmond Export, and that such contract is to such extent unenforceable and void.[18]

Respondents argue that even if it is found the clauses in question are not work preservation clauses, in any event the work involved is "fairly claimable" and within the meaning of *Wilson and Co.*,[19] and thus should be found valid. That longshoremen have the capacity or know-how to do the work can not be denied. They have done the same kind of work that is in dispute. But *the work* the Respondent Unions now seek by requiring that all container freight station work be done by ILWU members is not recapture of work—in my opinion—but work acquisition. The evidence shows that the Container Freight Station Supplement was negotiated to acquire work for the entire Pacific coastwide bargaining unit. As already indicated the primary work which the unit employees here perform is considerably more limited than that which they seek to preserve. The traditional and historical work of the unit has been to load and unload cargo aboard ship. As the Board indicated in *Fortunato, supra,* the fact that the "stuffing" of a container off the dock may require the same skills or knowledge as "stuffing" a container on the dock is not persuasive that all container loading is therefore "fairly claimable" by the ILWU. This is particularly true where *the work* which the disputed contract would take away from non-ILWU members, has never been performed by longshoremen.

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[18]See *Local 282, (Fortunato)*, 197 NLRB No. 124, and the many cases cited therein.

[19]*Meat and Highway Drivers, Local 710 [Wilson and Co.] v. N.L.R.B.*, 335 F. 2d 709 (C.A.D.C.).

The conclusion seems inescapable that both Respondents must have foreseen secondary consequences within Section 8(e)'s intendment would flow from the Container Freight Station Supplement to the PCLCA in view of the economic history, circumstances of the industry, size of the unit and the extent to which the disputed work has always been done outside the unit.[20] And I so find.

The Respondents argue most persuasively that the Container Freight Station Supplement clauses are work preservation clauses like those involved in *National Woodwork, supra,* which had been implicitly recognized as a mandatory subject of collective bargaining in the area of subcontracting out of work performed by members of the *bargaining unit* by the Supreme Court in the *Fibreboard* decision.[21] This case does not turn on a similar factual situation and as already indicated is more nearly analogous to the facts of *U.S. Naval Supply Center, supra.* I am of the opinion that the *dispute work*—stuffing containers at the Cal Cartage Container Freight Station—has never been performed by ILWU members.

However, this raises the whole question of the work of the *bargaining unit* and whether or not individual member companies of an otherwise appropriate bargaining unit within the meaning of Section 9(c) of the Act may become secondary employers if and when the skills, or work to be performed, are so widely variant from company to company. As has been noted, there are three types of companies that are members

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[20]*Wilson and Co., supra.*

[21]*Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203 (1964).

of PMA—shipping companies, terminal companies and stevedoring companies. The geographical area of the unit is the entire Pacific Coast (California, Oregon and Washington). The primary work performed by the employees on the ship is unrelated to that performed by the terminal or stevedoring employees. The skills employed by the terminal employees are quite different from those of the stevedoring company employees, although the act of accomplishing their common task of getting the cargo aboard ship is, of course, closely related. Under these circumstances, and particularly where as in the instant case some PMA members may not employ longshoremen, General Counsel argues that the Container Freight Station Supplement clauses exceed a *primary* work preservation aim and cites *Old Dutch Farms, Inc.*[22] wherein the involved employers were members of the same multi-employer *bargaining unit,* but the court said at page 32: "the integration of Balsam and Old Dutch operations on a merely functional plane is an improper basis for concluding that both have primary employer status under the secondary boycott provisions." The court goes on to say, "Since the object of every secondary boycott is really to cause a cessation of business between two independent companies, the Labor Act's prohibitions would be nullified if a union were allowed to claim that the very business relationship it seeks to end makes both parties 'primary' employers." While I have not elected to decide this case on the above-related argument, I nevertheless am of the opinion that it is possible to have secondary and primary employers within the same multi-employer appropriate

[22]*Milk Drivers and Dairy Employees, Local 584,* 146 NLRB 509, enfd. 341 F. 2d 29.

bargaining unit. Where the multi-employer group is one of mixed disciplines and widely variant work functions, the holding in *Dixie Mining Co.*,[23] that "the 'unit' for which subcontracting clauses may lawfully seek to preserve work are units appropriate for collective bargaining within the meaning of Section 9 of the Act," would seem to be extremely broad and not to be applied in every situation.

Section 8(b)(4) Issues

Having found the Container Freight Station Supplemental Agreement to be violative of 8(e), I now turn to a consideration of whether Respondent Unions' conduct in seeking to compel its execution and/or implementation violated 8(b)(4)(i) and (ii)(B) of the Act.

The following was stipulated to by all parties.

Respondent International Union sent a letter to the various locals on or about June 14, 1971, which in part read:

> The rest of the program of action as report to the last longshore caucus, namely to see that all containers not stuffed by the registered work force will not be loaded aboard ship after 12:01 a.m. June 30, 1971 unless such loads fall under the exception of manufacturers' loads, military cargo, door-to-door delivery or pickup (domestic trade) remain in effect.

On or about June 17, 1971, said letter was published in the official publication of Respondent International,

[23]*International Union, United Mine Workers of America (Dixie Mining Co.),* 165 NLRB 465 at 468.

"The Dispatcher", and copies of "The Dispatcher" were mailed to the various locals and distributed to their members. On or about June 24, 1971, Respondent Local 13 published in its official publication, "Bulletin," an article, a portion of which read as follows:

> THE PROGRAM OF NOT WORKING CONTAINERS ON JUNE 30, 1971—OTHER THAN THOSE STUFFED AND UNSTUFFED BY LONGSHOREMEN, AND THE EXCEPTIONS OUTLINED IN THE CONTRACT, IS STILL IN EFFECT. EXCEPTIONS: Manufacturers' regular type Loads & Shippers' Loads.

Copies of the "Bulletin" containing the above item were distributed to the members of Respondent Local 13.

Mr. Jeffery Amos, night stevedore superintendent for LACT on June 29, 1971, whose testimony was not contradicted, testified that on the late evening of June 29, 1971, at about 11:30 or 11:45, John Pandora, president of Respondent Local 13, and Joe Argentio, vice president of Respondent Local 13, came to LACT and instructed the marine clerks and longshoremen employed by LACT that as of 12:01 a.m. June 30, 1971, containers stuffed by non-ILWU personnel were not to be accepted or loaded aboard vessels at LACT, unless the containers were shippers' loads. Containers to be unstuffed by non-ILWU personnel were not to be made available for pickup. Thereafter the ILWU clerks requested copies of the container load plan. (The load plan showed the container number, port of discharge, port of loading, point of loading, shippers, consignees, weight, cube and seal number.)

Mr. Chodzko, vice president of Cal Cartage, testified that he was called to LACT at about 9:50 a.m. on June 30, 1971, and there learned that LACT was refusing to accept a Cal Cartage stuffed container. Mr. Chodzko further testified he talked by telephone with two men who identified themselves as Mr. Pandora and Mr. Jackson, president of Respondent Local 63, and that they informed him that in accordance with the contract language contained in the Container Freight Station Supplement, "they would not allow the container to be received by L.A. Container Terminal." According to Chodzko, Pandora and Jackson were careful to point out that "your beef is with LACT and not with us." Thereafter Chodzko requested Mr. Charles Brown, manager of LACT, to direct the marine clerk to receive the container. According to Chodzko, Mr. Brown replied, "I wish you wouldn't make me do this because if I do the entire longshore group will walk off the ship and he will close us down." Thereafter at the suggestion of his attorney, Mr. Chodzko directed the container to be returned to the Cal Cartage Container Freight Station and no further attempt was made to deliver containers stuffed by Cal Cartage employees.

A similar refusal by the ILWU clerk at Consolidated Marine Terminal to handle inbound containers for pickup by Cal Cartage non-longshore personnel to be delivered to the Cal Cartage warehouse on the morning of June 30, 1971, was related by Perry Luallin, a truck driver for Cal Cartage. I credit his testimony and regard the incident as a violation of the Act, but have not analyzed this incident in great detail herein, because it is not necessary for my decision and would not alter my remedy and order.

Accordingly, I find that Respondent Unions did induce and encourage the employees of PMA in the course of their employment to refuse to handle the containers stuffed by Cal Cartage with an object of forcing the PMA member companies to cease doing business with Cal Cartage, thereby bringing pressure to bear on Cal Cartage to displace its own employees engaged in stuffing and/or unstuffing containers at its Container Freight Station with ILWU members, and in so doing Respondent Unions violated Section 8(b)(4)(i) and (ii)(B) of the Act.[24]

Upon the basis of the foregoing findings and the entire record in the case, I make the following:

Conclusions of Law

1. Pacific Maritime Association and its many member companies and the Charging Parties, California Cartage Company, Inc., Pacific Motor Trucking Company, International Cargo Services, Inc., and Richmond Export Services, Inc., are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Respondent Unions are labor organizations within the meaning of Section 2(5) of the Act. John Pandora and Joe Argentio are agents of Respondent Unions within the meaning of Section 2(13) of the Act.

3. By entering into, maintaining and enforcing the provisions of the Container Freight Station Supplement as negotiated between Respondent Unions and Respondent PMA, wherein Respondent PMA agreed to cease doing business with other persons, including Cal Cartage, PMT, International Cargo and Richmond Export, Respondents and each of them have engaged in unfair labor practices within the meaning of Section 8(e) of the Act.

4. By inducing, encouraging and restraining PMA and its member companies with an object of forcing or requiring them to cease doing business with Cal Cartage, Respondent Unions have engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found Respondent Unions and Respondent PMA to have engaged in certain unfair labor practices in violation of Section 8(e) and the Respondent Unions to have engaged in unfair labor practices in violation of Section 8(b)(4)(i) and (ii)(B) of the Act, I shall recommend that each Respondent cease and desist from the proscribed conduct and take certain affirmative action of the type which is conventionally ordered in such cases which I find necessary to remedy and remove the effects of the unfair labor practices and to effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[25]

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[24] *International Association of Heat and Frost Insulators and Asbestos Workers (Westinghouse Electric Corp.)*, 193 NLRB No. 4; and *National Woodwork, supra.*

[25] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National

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ORDER

1. Respondent Unions, International Longshoremen's and Warehousemen's Union, and Locals 10, 13, 34 and 63 of the International Longshoremen's and Warehousemen's Union, their officers, agents and representatives, shall:

(a) Cease and desist from:

(1) Entering into, maintaining, giving effect to or attempting to implement in any way the Container Freight Station Supplemental Contract to the master agreement known as the Pacific Coast Longshore and Clerks' Agreement between the PMA and the ILWU to the extent and in the manner said agreement has been found to be unlawful herein.

(2) Threatening, coercing, restraining, inducing or encouraging PMA or any of its member companies, or any other person engaged in commerce, or in an industry affecting commerce, where an object thereof is to force or require such persons to cease doing business with Cal Cartage, or any other person.

(b) Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(1) Notify members of the International Longshoremen's and Warehousemen's Union[26] that Respond-

Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[26]While Locals 10, 13, 34 and 63 of the ILWU were specifically named in these consolidated cases, I shall not direct that those locals take any specific affirmative action which might tend to set them apart from all other International Longshoremen's and Warehousemen's Union locals. Because Respondent International Union negotiated the PCLCA master

ent Unions have no objections to loading or unloading containers that have been stuffed, or are to be unstuffed by employees of Cal Cartage, PMT, International Cargo, and Richmond Export, or any other employer utilizing non-ILWU members in the performance of these duties.

(2) Notify all members of the International Longshoremen's and Warehousemen's Union that any previous instructions, requests, or appeals which Respondent Unions may have made against loading or unloading containers not stuffed, or to be unstuffed, by other than ILWU members have been withdrawn and are to have no force and effect.

(3) Notify all members of the International Longshoremen's and Warehousemen's Union that any and all of the paragraphs contained in the Container Freight Station Supplemental Agreement negotiated by and between PMA and ILWU which limit, restrain, restrict, tax, or prohibit handling in the customary manner, containers that have been stuffed, or are to be unstuffed, by non-ILWU members have been found to be void and unenforceable and are to be stricken from said agreement.

(4) Post at their business offices, meeting halls and all dispatch halls copies of the attached notice marked Appendix D.[27] Copies of said notice, on

agreement, as well as the Container Freight Station Supplement, the conduct required on behalf of the International should result in corrective action being taken by *all* locals.

[27]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDERS OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN

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forms provided by the Regional Director for Region 21, after being duly signed by a representative of Respondent International Union, shall be posted immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter in conspicuous places, including the dispatch halls and all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Unions to insure that said notices are not altered, defaced, or covered by any other material.

(5) Furnish said Regional Director with signed copies of the aforesaid notice for posting by California Cartage Company, Inc., Pacific Motor Trucking Company, International Cargo Services, Inc., and Richmond Export Services, Inc., or such of said employers as may be willing, at all places where notices to their respective employees are customarily posted.

(6) Notify the Regional Director for Region 21, in writing, within 20 days from the date of receipt of this Decision, what steps Respondent Unions have taken to comply herewith.[28]

2. Pacific Maritime Association, of San Francisco, California, its officers, agents, successors and assigns, shall:

(a) Cease and desist from entering into, maintaining, enforcing or giving effect to any or all of those sections of the Container Freight Station Supplemental Agreement negotiated by and between PMA and ILWU

ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[28]In the event that this recommended Order is accepted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith."

which restrict, restrain, limit, tax or prohibit handling in the customary manner, containers that have been stuffed, or are to be unstuffed, by non-ILWU members.

(b) Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(1) Notify all company members of the Pacific Maritime Association, that any previous instructions, requests or appeals which Respondent PMA may have made against loading or unloading containers that have been stuffed, or are to be unstuffed, by non-ILWU personnel are to be withdrawn and to have no force and effect.

(2) Notify all company members of Pacific Maritime Association that any and all provisions of the Container Freight Station Supplement which has been negotiated between the PMA and ILWU which restrain, restrict, limit, tax or prohibit handling in the customary manner containers that have been stuffed, or are to be unstuffed, by non-ILWU members have been found to be void and unenforceable and are to be stricken from said agreement.

(3) Mail to each of their member companies and post at their main office in San Francisco and at each area office copies of the attached notice marked Appendix E.[29] Copies of said notice on forms provided by the Regional Director for Region 21, after being duly signed by Respondent PMA's representative shall be posted by them immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter in conspicuous places including all places where notices to member companies are customarily

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[29]See footnote 27.

posted. Reasonable steps shall be taken by Respondent PMA to insure that said notices are not altered, defaced, or covered by any other material.

(4) Notify the Regional Director for Region 21, in writing, within 20 days from the date of receipt of this Decision, what steps Respondent PMA has taken to comply herewith.[30]

Dated:

/s/ James T. Rasbury
James T. Rasbury
Administrative Law Judge

[30]See footnote 28.

Decision and Order.

United States of America, Before the National Labor Relations Board.

International Longshoremen's and Warehousemen's Union; Local 13, International Longshoremen's and Warehousemen's Union; and Local 63, International Longshoremen's and Warehousemen's Union (California Cartage Company, Inc.) and Robert A. Curry, International Longshoremen's and Warehousemen's Union; Local 13, International Longshoremen's and Warehousemen's Union and Local 63, International Longshoremen's and Warehousemen's Union, Respondent Union and Pacific Maritime Association, Respondent Employer and California Cartage Company, Inc. and Pacific Motor Trucking Company, Charging Parties, International Longshoremen's and Warehousemen's Union; Local 10, International Longshoremen's and Warehousemen's Union; and Local 34, International Longshoremen's and Warehousemen's Union, Respondent Unions and Pacific Maritime Association, Respondent Employer and International Cargo Services, Inc. and Richmond Export Services, Inc., Charging Parties. Case 21-CC-1326, Cases 21-CE-103, 21-CE-112, Cases 21-CE-109, 21-CE-111, Case 21-CE-116.

DECISION AND ORDER

On October 19, 1972, Administrative Law Judge James T. Rasbury issued the attached Decision in this proceeding. Thereafter, General Counsel, Respondent Pacific Maritime Association,[1] the International Longshoremen's and Warehousemen's Union[2] and its

[1]Hereafter referred to as PMA.
[2]Hereafter referred to as ILWU.

Locals, and Charging Parties California Cartage Company, Inc., and Pacific Motor Trucking Company,[3] filed exceptions and supporting briefs. The General Counsel, Respondents PMA and ILWU, and Charging Parties PMT and California Cartage Company, Inc., also filed answering briefs. Charging Party PMT filed a motion to strike the two briefs filed by Respondent which pertain to other cases beyond the records herein, and Respondent ILWU filed a motion for oral argument.

On September 13, 1973, oral argument was heard before the Board[4] in the instant cases and in Cases 21-CD-298, 21-CD-308, 21-CD-314, in which the General Counsel, Charging Parties California Cartage Company, Inc., and PMT, and Respondents PMA and ILWU participated. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 692, also participated.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and oral argument and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as herein modified.[5]

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[3]Hereafter referred to as PMT.

[4]Without objection from any of the parties Board Member Howard Jenkins, Jr., then nominated for reappointment, but not yet confirmed by the Senate, was invited to sit with the Board during oral argument.

[5]Finding merit in certain of the General Counsel's exceptions, we hereby correct the following errors in the Administrative Law Judge's Decision:

(1) The Administrative Law Judge stated that the container stuffing done by California Cartage consisted of less than container loads. The record discloses, however, that a great amount of the stuffing done by this firm consists of "straight" loads, which are large lots of cargo on a single bill of lading which completely fill one or more containers.

(2) The Administrative Law Judge apparently inadvertently held that if the agreement involved herein was tactically calculated to satisfy objectives elsewhere, the Charging Parties are neutral bystanders, i.e., the secondary employers. In fact, he should have stated that under those circumstances PMA and its member companies would be the neutral bystanders.

(3) Further corrections have been made to the Conclusions of Law, the Order, and the Appendixes to reflect errors pointed out by certain exceptions of the General Counsel, including the deletion of Locals 10 and 34 of the ILWU from findings or orders concerning the 8(b)(4) violations.

The facts in these consolidated cases are not in dispute. Respondent PMA and Respondent Unions have a long history of collective bargaining covering longshoremen and marine clerks. Since 1961 these employees have been represented under the ILWU-PMA Pacific Coast Longshore and Clerks' Agreement or Document (PCLCA or PCLCD). In 1960, the parties negotiated and adopted a Modernization and Mechanization Agreement. This Agreement recognized for the first time that technological advances had seriously diminished available work for longshoremen and attempted to accommodate the legitimate interests and needs of both parties in the Pacific coast shipping industry. Under the Agreement PMA members gained the right to use new equipment to increase productivity and improve methods for handling cargo. In the future, nonlongshoremen delivering merchandise to the dock would not be required to place the cargo on the "skin of the dock" to be reloaded by longshoremen on other pallets for loading aboard ship. It was agreed that the Union would divest itself of this type of work and longshoremen would load truckers' pallets with the merchandise directly on the ship. Cargo could

be unitized in one way or another—boxed, crated, banded, glued, or palletized in large or small containers. The idea was to move the cargo in the safest and most efficient manner on or off the ship. To accomplish this objective new and improved winches and cranes became standard equipment. Moreover, at this time the process of containerization, the method whereby bulk cargo is placed in large containers, 8 by 8 by 20 or 40 feet or larger, was in its infancy and growing. Matson Navigation Company, a member of PMA, had already converted one of its freighters[6] in 1959 to carry a deckload of containers in addition to conventional cargo in its hold. While the record shows that longshoremen exclusively have always performed the actual work of loading and unloading merchandise, however contained, on and off ships, it is also clear that preparing cargo for shipment in various types of containers is work that had been performed over the years by teamsters and other employees as well as longshoremen.

In return for the Union's relinquishment of make-work practices, it was further agreed in the 1960 Agreement that the operation of all new equipment on the docks would be performed by longshoremen and, in addition, members of PMA would establish a mechanization fund of $29 million, subsequently augmented by another $34.5 million, to be used in support of longshoremen's pension, retirement, and unemployment.

During the early part of the 1960's, this compromise apparently worked to the satisfaction of the ILWU

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[6]Referred to in the record as *Hawaiian Citizen* or *Hawaiian Merchant*.

and PMA. At the same time, however, and with increasing acceleration, shipping companies began to adopt, some exclusively, the new method of transporting cargo known as "containerization." The use of boxes or bundles on or off pallets became a less desirable and uneconomical method of handling cargo in the new technology. Following the lead of Matson, other steamship companies converted their vessels to carry containers or constructed new ships solely for that purpose. Obviously, the larger and more self-contained the load, the less work for longshoremen to load or unload the ship and, as a parallel, the less time in port for the ship, with substantial savings to the shipping industry.

As indicated above, the modern container is a large enclosure 20 feet or more in length designed to fit into the slot of a containerized ship, or on the chassis of a truck, or piggyback on a train. The development of this method of carrying freight gave rise to the establishment of container freight stations. From the beginning shipping companies, members of PMA and owners of the containers, have contracted with trucking firms to stuff and unstuff some of these containers with merchandise from shippers or to consignees. These trucking firms, such as California Cartage and Pacific Motor Trucking, the Charging Parties in several of these cases, employ drivers and warehousemen represented by the Teamsters.

As the decade of the 1960's neared its end, the ILWU was concerned at the loss of longshore work to an extent not contemplated in the 1960 Agreement, and therefore sought and obtained from PMA the so-called Container Freight Station Supplements to their

collective-bargaining contract. These Supplements were executed on January 5, 1970, and February 10, 1972, and provided, in effect, that all stuffing and unstuffing of containers to be loaded or unloaded from ships docking in Pacific coast ports, except for shippers' loads and door-to-door deliveries, was work to be performed by ILWU members. The intent of the 1970 Supplement was to bring container work "to the dock or to areas adjacent to the dock on or before June 30, 1971." This would require shipping companies to cease subcontracting container stuffing work to employers who did not employ ILWU members and to establish, if necessary, their own container freight stations on or adjacent to the docks within the work jurisdiction of the ILWU.

At issue in these cases is, first, the legality under Section 8(e) of the above contractual provisions and, second, the legality under Sections 8(b)(4)(i) and (ii)(B) of conduct by Respondent International and its Locals 13 and 63 in taking action to implement these provisions, as set forth in detail in the Administrative Law Judge's Decision.

The Board has considered Respondents' defense that the work of stuffing and unstuffing modern containers is work that falls into the category of unit work traditionally performed by members of ILWU within the multiemployer PMA unit and that their attempt to preserve or reclaim this work for ILWU-represented employees is primary, lawful activity under the Supreme Court's decision in *National Woodwork Manufacturers v. N.L.R.B.*[7] Although the loss of work on the docks, whether due to the use of large containers or other

[7]386 U.S. 612 (1967).

technological improvements, is certainly a matter of legitimate concern to the ILWU, we cannot agree with its legal position in these cases.

Initially, it is clear from the language of the Supplements that the ILWU's claim to container stuffing work is not limited to work generated by members of PMA, but extends broadly to all containers entering or leaving Pacific coast docks, whether or not the owners of the containers are members of PMA and statutory employers of employees within the longshore unit represented by ILWU. Obviously, as to those shipping companies, nonmembers of PMA using the Pacific coast docks to load or unload their containers, the statute does not permit a restrictive contract or a refusal to handle their containers to put pressure on them to cease doing business with trucking, cartage, or other companies which do not employ ILWU members.

With respect to Respondents' reliance upon *National Woodwork, supra,* that rule cannot be applied so broadly as to encompass all efforts by unions to enlarge the work opportunities for members of a bargaining unit adversely affected by technological advances. In that case the Court set forth its views in three opinions, of which Justice Harlan's concurring opinion established a majority of five to four. The main opinion cautioned that the test in determining the legality of a restrictive clause was not "simple" and must be made with full concern for "all the surrounding circumstances." Such circumstances were defined by the Court as including "the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the

employers who would be boycotted, and the economic personality of the industry."[8] Justice Harlan was careful to note that the case before him did not involve a restrictive contract or boycott to acquire for union members "work that had not previously been theirs."[9] Rather, it was a question of union carpenters seeking to continue their traditional practice of mortising, routing, and beveling blank doors on the jobsite before installation. In the context of these narrow facts, he held that Congress had not forbidden this method of meeting the economic problem arising from a changing technology. Four Justices, dissenting, held that the union's boycott of the prefitted doors fell clearly within "the express terms of the federal labor law."[10]

In *Fibreboard Paper Products Corp. v. N.L.R.B.*,[11] upon which Respondents further rely, the Court restricted its holding of a violation of Section 8(a)(5) in a question involving subcontracting to the facts of that case; i.e., "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment."[12]

In the instant case the record shows that the stuffing and unstuffing of containers, whether large or small, modern or pre-World War II, is work that has been performed both by longshoremen and by other employees, including teamsters employed by the Charging Parties. It may well be, as the ILWU contends, that

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[8]386 U.S. at 644, fn. 38.

[9]*Id.* at 648.

[10]*Id.* at 650.

[11]379 U.S. 203 (1964).

[12]*Id.* at 215.

the modern container is, in effect, part of a ship. But it is also true that the same container is part of a truck or perhaps a train. The traditional work of the ILWU has been to load and unload ships. To a large extent, the make-work rights claimed by longshoremen with respect to cargo placed on the dock were effectively bargained away in 1960. The contract made between the concerned employers and the ILWU in that year is of historic significance because it represented a new approach to the serious problem of employee displacement as a result of technological changes. In good-faith collective bargaining the parties recognized each other's vital interests in a bargain which accommodated themselves and the public. Instead of insisting that technological changes must be restricted, the Union agreed to progress which was, in any event, inevitable. The Companies, on the other hand, assumed responsibility for the economic consequences to union members in the loss of employment. If, indeed, as Respondents insist, longshore work has fallen to an unacceptable level, the way should be clear to the parties to resolve their differences without renewing old wars and illegally affecting the rights of other employers and their employees.

Respondents call to the Board's attention the fact that their Container Freight Station Supplements relate to only a small portion of the work of stuffing and unstuffing containers since shippers' loads, representing 85 percent of that work, are not included. The work of stuffing containers, however, does not change its essential character because it is performed by shippers rather than trucking company employees. Indeed, the evidence indicates that a substantial portion of the

work of California Cartage employees involves the stuffing of straight or full loads into containers as well as less than container loads. While the ILWU does not now seek all container work, the logic of its position is that it is legally entitled to all such work without regard to the identity of the competing employees. Obviously, a boycott to enforce a claim to stuff shippers' loads and door-to-door deliveries would have an enormous impact on the shipping industry. This circumstance, among others set forth above, clearly distinguishes this case from *National Woodwork, supra.* It is, moreover, a circumstance which, in accordance with the Court's *caveat* in that case, warrants the Board's full concern in determining the validity of the ILWU's claim of work preservation.

In reaching our decision in this case we find it unnecessary to pass upon or adopt the Administrative Law Judge's opinion that both secondary and primary employers may coexist in the same multiemployer bargaining unit. We reject the General Counsel's argument that members of PMA who do not directly employ longshoremen are neutral, secondary employers entitled to the protection of Section 8(b)(4) of the Act.

The ILWU's unit of longshoremen was found appropriate by the Board in 1938.[13] At that time the Board recognized and accepted the fact that not all members of the Waterfront Associations, predecessors of PMA, directly employed longshoremen. Nevertheless, the Board was cognizant then, as it is now, that employers in the shipping industry on the Pacific coast have a direct and vital interest in the terms and conditions

[13] *Shipowners' Association of The Pacific Coast,* 7 NLRB 1002 (1938).

of employment for longshoremen. The history of labor relations in that industry has been fraught with extraordinary problems, which have extended beyond the customary employer-employee relationship. As the Board pointed out in 1938, the statute defines the term "employer" to include any person acting as an agent for an employer "directly or indirectly." All members of PMA have given that agency the authority to act as their agent and PMA, in turn, is clearly the agent of employers employing longshoremen. In this particular industry the community of interest of the participating employers is unmistakable. We need not, however, and do not go beyond the facts of this case and this industry in holding that all members of PMA are, with respect to the ILWU, primary employers for the purposes of collective bargaining in the established unit of longshoremen and marine clerks.

On the basis of the foregoing, we find that by entering into the 1970 and 1972 Container Freight Station Supplements, Respondent PMA and Respondent Unions violated Section 8(e) of the Act.

Further, by their inducement and encouragement to the employees of PMA not to handle containers stuffed by non-ILWU labor, and their refusal to handle cargo in an attempt to implement the Container Freight Station Supplement, Respondents ILWU and its Locals 13 and 63 violated Section 8(b)(4)(i) and (ii)(B) of the Act.

Amended Conclusions of Law

Substitute the following for the Administrative Law Judge's Conclusion of Law 4:

"4. By inducing and encouraging individuals employed by PMA and its member companies to engage

in work stoppages or refusals to perform services in the course of their employment, and by threatening, coercing, and restraining PMA and its member companies with an object of forcing or requiring them to cease doing business with California Cartage, Respondent ILWU and its Locals 13 and 63 have engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act."

The Remedy

Having found Respondent Unions and Respondent PMA to have engaged in certain unfair labor practices in violation of Section 8(e), and Respondents ILWU and its Locals 13 and 63 to have engaged in unfair labor practices in violation of Section 8(b)(4)(i) and (ii)(B) of the Act, we shall order that each Respondent cease and desist from the proscribed conduct and take certain affirmative action which we find necessary to remedy and remove the effects of the unfair labor practices and to effectuate the policies of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

1. Respondent Unions, International Longshoremen's and Warehousemen's Union and Locals 13 and 63 of the International Longshoremen's and Warehousemen's Union, their officers, agents, and representatives, shall:

(a) Cease and desist from:

(1) Entering into, maintaining, giving effect to, or attempting to implement in any way the Container

Freight Station Supplements to the master agreement known as the Pacific Coast Longshore and Clerks' Agreement between the PMA and the ILWU to the extent and in the manner said agreement has been found to be unlawful herein, or any other contract or agreement, express or implied, whereby PMA, on behalf of its member companies, agrees to cease or refrain from doing business with any other person in violation of Section 8(e) of the Act.

(2) Threatening, coercing, or restraining PMA or any of its member companies, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require such persons to cease doing business with California Cartage, or any other person.

(3) Inducing and encouraging any individual employed by PMA or its member companies to engage in work stoppages or a refusal to perform services in the course of his employment, where an object thereof is to force or require such persons to cease doing business with California Cartage, or any other person.

(b) Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(1) Notify members of the International Longshoremen's and Warehousemen's Union that Respondent Unions have no objections to loading or unloading containers that have been stuffed, or are to be unstuffed, by employees of California Cartage, PMT, International Cargo, and Richmond Export, or any other employer utilizing non-ILWU members in the performance of these duties.

(2) Notify all members of the International Longshoremen's and Warehousemen's Union that any previous instructions, request, or appeals which Respondent Unions may have made against loading or unloading containers not stuffed, or to be unstuffed, by other than ILWU members have been withdrawn and are to have no force or effect.

(3) Notify all members of the International Longshoremen's and Warehousemen's Union that any and all of the paragraphs contained in the Container Freight Station Supplements negotiated by and between PMA and ILWU which limit, restrain, restrict, tax, or prohibit handling, in the customary manner, containers that have been stuffed, or are to be unstuffed, by non-ILWU members have been found to be void and unenforceable and are to be stricken from said agreement.

(4) Post at their business offices, meeting halls, and all dispatch halls copies of the attached notice marked "Appendix A."[14] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by a representative of Respondent International Union, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including the dispatch halls and all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent

[14]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Unions to insure that said notices are not altered, defaced, or covered by any other material.

(5) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent Unions have taken to comply herewith.

2. Respondent Unions, International Longshoremen's and Warehousemen's Union and Locals 10 and 34, of the International Longshoremen's and Warehousemen's Union, their officers, agents, and representatives, shall:

(a) Cease and desist from entering into, maintaining, giving effect to, or attempting to implement in any way the Container Freight Station Supplements to the master agreement known as the Pacific Coast Longshore and Clerks' Agreement between the PMA and the ILWU to the extent and in the manner said agreement has been found to be unlawful herein, or any other contract or agreement, express or implied, whereby PMA, on behalf of its member companies, agrees to cease or refrain from doing business with any other person in violation of Section 8(e) of the Act.

(b) Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(1) Notify all members of the International Longshoremen's and Warehousemen's Union that any and all of the paragraphs contained in the Container Freight Station Supplements negotiated by and between PMA and ILWU which limit, restrain, restrict, tax, or prohibit handling, in the customary manner, containers that have been stuffed, or are to be unstuffed, by non-ILWU members have been found to be void and

unenforceable and are to be stricken from said agreement.

(2) Post at their business offices, meeting halls, and all dispatch halls copies of the attached notice marked "Appendix B."[15] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by a representative of Respondent International Union, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicious places, including the dispatch halls and all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Unions to insure that said notices are not altered, defaced, or covered by any other material.

(3) Furnish said Regional Director with signed copies of the aforesaid notice for posting by California Cartage Company, Inc., Pacific Motor Trucking Company, International Cargo Services, Inc., and Richmond Export Services, Inc., or such of said employers as may be willing, at all places where notices to their respective employees are customarily posted.

(4) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent Unions have taken to comply herewith.

3. Pacific Maritime Association, San Francisco, California, its officers, agents, successors, and assigns, shall:

(a) Cease and desist from entering into, maintaining, enforcing, or giving effect to any or all of those

[15]See fn. 14.

sections of the Container Freight Station Supplements negotiated by and between PMA and ILWU which restrict, restrain, limit, tax, or prohibit handling, in the customary manner, containers that have been stuffed, or are to be unstuffed, by non-ILWU members.

(b) Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(1) Notify all company members of the Pacific Maritime Association that any previous instructions, requests, or appeals which Respondent PMA may have made against loading or unloading containers that have been stuffed, or are to be unstuffed, by non-ILWU personnel are to be withdrawn and to have no force or effect.

(2) Notify all company members of Pacific Maritime Association that any and all provisions of the Container Freight Station Supplements which have been negotiated between the PMA and ILWU which restrain, restrict, limit, tax, or prohibit handling, in the customary manner, containers that have been stuffed, or are to be unstuffed, by non-ILWU members have been found to be void and unenforceable and are to be stricken from said agreement.

(3) Mail to each of their member companies and post at their man office in San Francisco and at each area office copies of the attached notice marked "Appendix C."[16] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent PMA's representative, shall be posted by them immediately upon receipt thereof, and be maintained by them for 60 consecutive

[16]See fn. 14.

days therefter, in conspicuous places, including all places where notices to member companies are customarily posted. Reasonable steps shall be taken by Respondent PMA to insure that said notices are not altered, defaced, or covered by any other material.

(4) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent PMA has taken to comply herewith.

Dated, Washington, D.C., Feb. 11, 1974.

Edward B. Miller, Chairman
John H. Fanning, Member
Howard Jenkins, Jr., Member
Ralph E. Kennedy, Member
John A. Penello, Member
NATIONAL LABOR RELATIONS BOARD

[Seal]